No. 78-724

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLARD S. WALKER, PETITIONER

v.

JOHN O. HOFFMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the district court erroneously granted summary judgment in favor of the respondents—six employees of the United States Forest Service who seized or destroyed petitioner's tools and structure on his putative mining claim after they warned him twice that they would take such action unless he removed them himself.

The affidavits filed in the district court showed that the six employees acted on the basis of advice

of the Regional Attorney of the Forest Service that petitioner had no lawful right to maintain his house and property on Forest Service lands (Pet. 8 n.2). Accordingly, under the holding of *Butz* v. *Economou*, No. 76-709 (June 29, 1978), slip op. 6-17, 25-29, respondents were entitled to summary judgment, on the basis of a qualified immunity, unless there was evidence tending to show that respondents knew or believed that petitioner had a valid right to maintain his house and property on the land. Petitioner, however, refers to no such evidence. The inter-agency correspondence referred to by petitioner (Pet. 6-7) indicates at best that the Forest Service had questions about the legality of petitioner's mining claim. Accordingly, they sought the advice of the Regional Attorney. In reliance on the advice, they gave petitioner notice to remove his property in accordance with procedures for the removal of unauthorized property set forth in the Forest Service Manual (Pet. App. A-8). When petitioner failed to do so, respondents removed the property from Forest Service lands as allowed by those procedures. Nothing in the correspondence quoted by petitioner suggests that after receipt of the Regional Attorney's advice respondents knew or should have known that petitioner had a valid right to maintain his property on Forest Service land. Summary judgment was therefore properly granted.

Petitioner argues (Pet. 16) that he should have been allowed to cross-examine respondents about their knowledge and belief. He does not contend,

however, that he invoked, much less that the district court improperly denied, the procedure of Fed. R. Civ. P. 56(f), which permits a court to postpone ruling on a summary judgment motion in order to allow discovery of the type petitioner mentions.[1] Absent any such claim, Rule 56 makes it quite clear that a summary judgment motion may not be denied merely because the party opposing it hopes to develop evidentiary leads at trial or later proceedings; rather, Rule 56 requires the district court, as it observed (Pet. App. A-12 to A-13), to determine if there are genuine issues of material fact based on the summary judgment record before the court. Here, the district court and the court of appeals held that the summary judgment record presented no genuine issue of material fact concerning respondents' immunity. There is no need for this Court to review that essentially factual conclusion, concurred in by two lower courts. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

The courts below correctly followed the suggestion of this Court in *Butz* v. *Economou*, *supra*, slip op. 28-29, that "damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary

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[1] Petitioner made untimely objections (see Pet. App. A-12) to the summary judgment, but those objections did not contend that he was entitled to cross-examine respondents or request discovery concerning their knowledge or beliefs. See Plaintiff's Objections to Magistrate's Finding and Recommendation and Motion for Supplemental Findings and Conclusions, filed May 16, 1977, in the district court.

judgment based on the defense of immunity," and that "[i]n responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

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